

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING ON
ARM 1.3.211 through 1.3.224,)	PROPOSED AMENDMENT AND
1.3.226, 1.3.227, 1.3.229 through)	REPEAL
1.3.233; and repeal of ARM 1.3.225,)	
all pertaining to model rules)	

TO: All Concerned Persons

1. On June 11, 2008, at 10:30 a.m., a public hearing will be held to consider the proposed amendment and repeal of the above-stated rules in Room 455, State Capitol Building, Helena, Montana. This hearing is being held in conjunction with the Secretary of State's Office public hearing on proposed changes to model rules in this issue of the Montana Administrative Register in MAR Notice No. 44-2-145.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on May 29, 2008, to advise us of the nature of the accommodation that you need. Please contact Ali Bovingdon, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail abovingdon@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

1.3.211 CONTESTED CASES, INTRODUCTION (1) A rule is an agency determination statement of general applicability that interprets law or describes agency requirements. ~~It applies to all persons who come within its terms are subject to the requirements or regulations of the agency.~~ In contrast, a contested case involves an agency determination applicable to that affects the rights or responsibilities of a specifically named party. "Contested case" and "party" are defined by 2-4-102, MCA.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.212 MODEL RULE 8 CONTESTED CASES, NOTICE OF OPPORTUNITY TO BE HEARD (1) All parties to contested cases shall be afforded notice of hearing. ~~pursuant to 2-4-601, MCA.~~ As illustrated by sample form ~~18~~ 212a, the notice must include:

(a) ~~all items required by 2-4-601(2), MCA;~~ the time, place, and nature of the hearing;

(b) the legal authority and jurisdiction under which the hearing is being

conducted:

- (c) a citation to the statutes and rules involved;
- (d) a short and plain statement of the issues involved;
- (e) notice that formal proceedings may be waived pursuant to 2-4-603, MCA;
- (b) (f) a provision statement advising parties of their right to be represented by counsel at the hearing; (2-4-105, MCA); and
- (c) remains the same but is renumbered (g).

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.213 MODEL RULE 9 CONTESTED CASES, EMERGENCY SUSPENSION OF A LICENSE (1) Section Pursuant to 2-4-631(3), MCA, provides: "...If the agency finds that public health safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined." if an agency makes a determination that public health, safety, or welfare requires emergency action, the agency may order immediate suspension of a license. The order must include findings justifying emergency action, and revocation proceedings must be promptly instituted and determined.

- (a) See sample form 19 213a.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.214 MODEL RULE 10 CONTESTED CASES, DEFAULT ORDER
(1) If In a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to 2-4-623, MCA, the order must contain be in writing and include findings of fact and conclusions of law. 2-4-623, MCA.

- (a) See sample form 20 214a.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.215 MODEL RULE 11 CONTESTED CASES, INFORMAL DISPOSITION (1) remains the same.
(2) Any informal Informal proceedings in contested cases must be conducted in accordance with the provisions of 2-4-604, MCA. give the parties an opportunity to present to the agency or the hearing examiner written or oral evidence challenging the agency's actions, its refusal to act, its justifications for determination, or other evidence relating to the contested case.

(3) An informal conference, in the nature of a pretrial conference, may be used conducted prior to the proceedings in order to define issues, determine witnesses, and agree upon stipulations.

(4) A record of proceedings conducted under this part must be made in accordance with 2-6-604, MCA.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.216 MODEL RULE 12 CONTESTED CASES, APPLICATION FOR MORE DEFINITE AND DETAILED STATEMENT (1) Upon application to the agency or the designated hearing examiner, a party who has been given notice of a contested case hearing may apply for a more definite and detailed statement of the issues involved in the hearing. ~~2-4-604(2)(d), MCA.~~

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.217 MODEL RULE 13 CONTESTED CASES, DISCOVERY (1) ~~Section 2-4-602, MCA requires each agency to provide in its rules for discovery prior to a contested case hearing.~~

~~(2) In all contested cases, discovery shall be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure, in effect on the date of the adoption of this rule and any subsequent rule amendments thereto. However, Rule 27 and Rule 37(b)(1) and 37(b)(2)(D) shall not apply. Provided, however, all references to the "court" shall be considered to refer to the appropriate "agency"; all references to the use of the subpoena power shall be considered references to Model Rule 25 ARM 1.3.230; all references to "trial" shall be considered references to "hearing"; all references to "plaintiff" shall be considered references to "a party"; all references to "clerk of court" shall be considered references to the person designated by the department head to keep documents filed in a contested case.~~

~~(3) (2) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the agency in which the action is pending, the refusal to obey such agency order shall be enforced as provided in Model Rule 25 ARM 1.3.230.~~

(4) remains the same but is renumbered (3).

AUTH: 2-4-202, 2-4-203, MCA
IMP: 2-4-202, MCA

1.3.218 MODEL RULE 14 CONTESTED CASES, HEARING EXAMINERS (1) ~~Section 2-4-611, MCA allows the An agency to may appoint a hearing examiners for the to conduct of a hearings in a contested cases.~~

~~(2) The powers of the agency members or hearing examiners presiding over hearings are enumerated in 2-4-611(3), MCA. A hearing examiner appointed under this part may:~~

- (a) administer oaths or affirmations;
- (b) issue subpoenas;
- (c) provide for the taking of testimony and deposition;

(d) set the time and place for hearing;
(e) set motion and briefing schedules; and
(f) by mutual consent of the parties, hold conferences to consider narrowing or simplifying the issues.

(3) If a defending party notifies the agency that he the party will appear at the hearing to contest the intended action, the agency must advise all parties of the appointment of either an agency member or a hearing examiner to manage the case, as illustrated by sample form 24 218a.

~~(4) Disqualification of a hearing examiner or agency member is provided for under~~ Pursuant to 2-4-611(4), MCA, an agency may disqualify a hearing examiner if the agency determines personal bias, lack of independence, disqualification by law, or other disqualification criteria exist. A motion to disqualify filed by a party must be supported by affidavit.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.219 MODEL RULE 15 CONTESTED CASES, HEARING (1) The contested case hearing shall be conducted before the decision making authority of the agency or a hearing officer designated in accordance with ~~Model Rule 14~~ ARM 1.3.218.

(2) The presiding officer must ensure that all parties are afforded the opportunity to respond and present evidence and argument on all issues involved.

~~(2) remains the same, but is renumbered (3).~~

(a) opening statements;

~~(b) statement and evidence of affected parties supporting agency action;~~

~~(a) (b) statement and evidence of agency in support of its action~~
presentation of evidence by the agency;

(c) cross examination by the challenging party;

~~(e) (d) statement and evidence of affected parties disputing agency action;~~
and presentation of evidence by the challenging party;

(e) cross examination by agency; and

~~(d) remains the same but is renumbered (f).~~

~~(3) The hearing may be continued with recesses as determined by the presiding officer. 2-4-611, MCA.~~

~~(4) The hearing shall proceed in compliance with 2-4-612(1), (4) and (5), MCA.~~ All testimony must be given under oath or affirmation.

~~(5) The presiding officer must ensure that all parties are afforded the opportunity to respond and present evidence and argument on all issues involved. 2-4-612(1), MCA.~~ Exhibits shall be marked and shall identify the person offering the exhibits. The exhibits shall be preserved by the agency as part of the record of the proceedings.

~~(6) Exhibits shall be marked and the markings shall identify the person offering the exhibits. The exhibits shall be preserved by the agency as part of the record of the proceedings.~~ The presiding officer may hear closing arguments or order a briefing schedule for parties to submit proposed findings of fact and conclusions of law.

(7) The presiding officer may grant recesses or continue the hearing.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.220 MODEL RULE 16 CONTESTED CASES, RECORD (1) The record in a contested case shall include: ~~all items required by 2-4-614(1), MCA.~~

(a) all pleadings, motions, and rulings;

(b) all evidence, either written or oral, received, or considered by the presiding officer;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections, and rulings on objections;

(e) proposed findings and exceptions; and

(f) any decision, opinion, or report by the presiding officer which must be in writing.

~~(2) The record shall be transcribed and the costs of transcription paid as provided in 2-4-614(2), MCA.~~ At the request of any party, the record must be transcribed. The cost of transcription will be the responsibility of the requesting party.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.221 MODEL RULE 17 CONTESTED CASES, EVIDENCE (1) All Unless otherwise provided by statute, all evidence introduced in a contested case hearing shall be received and evaluated in conformance with 2-4-612(2), (3), (6) and (7), MCA common law and statutory rules of evidence.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.222 MODEL RULE 18 CONTESTED CASES, EX PARTE CONSULTATIONS COMMUNICATIONS (1) Section Pursuant to 2-4-613, MCA, protects all parties in a contested case from informal conferences between the agency and one of the parties. Such conferences may only occur under the circumstances and requirements provided in that section. ex parte communications with the presiding officer or any person authorized to participate in the decision of the contested case are prohibited unless otherwise authorized by law.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

1.3.223 MODEL RULE 19 CONTESTED CASES, PROPOSED ORDERS

(1) If a majority of the officials of the agency who are to render the final decision have not heard the case, ~~a proposed decision must be prepared and served pursuant to 2-4-621(1), (2) and (4), MCA.~~ a decision that is adverse to a party (other than the agency itself) may not be rendered until a proposed decision is

served upon the parties and the parties are given an opportunity to file exceptions and briefs, and present oral argument to the officials responsible for rendering a final decision.

~~(a) If the hearings officer becomes unavailable, proposed findings of fact may be prepared pursuant to 2-4-622, MCA.~~

~~(b) All parties shall be given equal opportunities to file exceptions and present briefs and oral argument.~~

~~(c) remains the same but is renumbered (2).~~

~~(2) remains the same but is renumbered (3).~~

~~(3) (4) The agency may adopt the proposed decision as the agency's final order, pursuant to 2-4-621(3), MCA.~~

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.224 ~~MODEL RULE 20~~ CONTESTED CASES, FINAL ORDERS

~~(1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record, and contain must include findings of fact and conclusions of law. These requirements shall all be fulfilled pursuant to 2-4-612(1) through (4), MCA.~~

~~(2) See sample form 23 224a.~~

~~(3) Parties and their attorneys shall be served with a copy of a final decision or order.~~

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.226 DECLARATORY RULINGS, INTRODUCTION ~~(1) A person taking or wishing to take a particular action may be unsure whether an agency regulation or a statute administered by an agency applies to that action. Section 2-4-501, MCA provides that a person may petition the agency for a declaratory ruling as to the applicability of a statute, regulation, or order, to his activity or proposed activity. A party may seek a declaratory ruling when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights.~~

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.227 ~~MODEL RULE 22~~ DECLARATORY RULINGS, CONTENT OF PETITION ~~(1) and (2) remain the same.~~

~~(3) See sample form 23 227a.~~

~~(4) remains the same.~~

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.229 ~~MODEL RULE 24~~ DECLARATORY RULINGS, EFFECT

(1) remains the same.

(2) A declaratory ruling or notice of refusal to issue such a ruling is a final agency decision subject to judicial review in the same manner as decisions or orders in contested cases.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.230 MODEL RULE 25 GENERAL PROVISIONS, SUBPOENAS

(1) Section 2-4-104, MCA provides broad authority to agencies to require An agency conducting contested case or declaratory ruling proceedings may require the furnishing of information, attendance of witnesses, and production of evidence through subpoena and subpoena duces tecum.

(a) Subpoenas shall be issued and served pursuant to 2-4-104(1), MCA. the rules of civil procedure. Except as provided by law, costs associated with the subpoena must be paid by the party who requested it.

(b) In the case of disobedience, an agency may petition a district court to compel compliance with a subpoena pursuant to 2-4-104(2), MCA. or the giving of testimony.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.231 MODEL RULE 26 GENERAL PROVISIONS, REPRESENTATION

(1) Section 2-4-105, MCA affords any A person appearing before the agency has the right to be accompanied, represented, and advised by counsel. The agency should advise a party to a contested case of his right to counsel.

(2) A corporation appearing before the agency is considered a separate legal entity and may not appear on its own behalf through an agent other than an attorney.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.232 MODEL RULE 27 GENERAL PROVISIONS, SERVICE (1) Unless otherwise provided by law, 2-4-106, MCA requires service on parties in accordance with requirements for service in civil actions. Unless otherwise provided by law and these rules, all motions and pleadings will must be served in accordance with the Montana Rules of Civil Procedure.

AUTH: 2-4-202, MCA

IMP: 2-4-202, MCA

1.3.233 MODEL RULE 28 GENERAL PROVISIONS, PUBLIC INSPECTION OF ORDERS, AND DECISIONS (1) The agency must maintain an index of all final orders and decisions in contested cases and declaratory rulings. All final decisions and orders shall be available for public inspection on request. 2-4-623(6), MCA.

Copies of final decisions and orders must be given to the public on request after payment of the cost of duplication.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

4. The department proposes to repeal the following rule:

1.3.225 MODEL RULE 21 CONTESTED CASES, NOTICE OF FINAL DECISION, found at page 1-132 of the Administrative Rules of Montana.

AUTH: 2-4-202, MCA
IMP: 2-4-202, MCA

REASONABLE NECESSITY: Effective October 1, 2007, House Bill 70 transferred to the Secretary of State some model rules previously assigned to the Attorney General. The reassigned rules describe the organization of agencies and model rules of practice for agencies to use as a guide for the rulemaking process and in fulfilling the requirements of 2-4-201, MCA. The Attorney General's model rules were last revised in 1992. The proposed amendments are necessary to update the model rules, express the content of the model rules in plain language for a user who is unfamiliar with contested case proceedings, and minimize the need for users to look to multiple sources in order to understand the administrative hearing process. Users will be able to rely on a consistent product that will help them participate in state government.

5. The sample forms referred to above have been renumbered, and are being amended to conform to formatting requirements. The content remains the same. The changes are as follows:

Sample Form 18	now	Sample Form 212a
Sample Form 19	now	Sample Form 213a
Sample Form 20	now	Sample Form 214a
Sample Form 21	now	Sample Form 218a
Sample Form 22	now	Sample Form 224a
Sample Form 23	now	Sample Form 227a

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Ali Bovingdon, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail abovingdon@mt.gov, and must be received no later than 5:00 p.m. on June 19, 2008.

7. Janice Doggett, Secretary of State's Office, has been designated to preside over and conduct the hearing.

8. An electronic copy of this Notice is available through the department's web site at <http://doj.mt.gov/resources/administrativerules.asp>. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

9. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above, or may be made by completing a request form at any rules hearing held by the department. A copy of the interested persons request form may be printed from the Department of Justice's web site at <http://doj.mt.gov/resources/administrativerules.asp>, and mailed to the rule reviewer.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified on February 4, 2008, by regular mail.

By: /s/ Mike McGrath
MIKE McGRATH
Attorney General
Department of Justice

/s/ Ali Bovingdon
ALI BOVINGDON
Rule Reviewer

Certified to the Secretary of State on May 12, 2008.